Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]

HAROLD ZUCKER,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1961

HAROLD ZUCKER,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

HAROLD ZUCKER prays that a writ of certiorari issue to review the judgment of the Appellate Division of the State of New York entered on March 6, 1962.

Citation of Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York is not reported. It is appended herewith. Federal issues raised that are not included in the opinion appear in the certificate of said Appellate Division appended herein.

Jurisdiction

The judgment of affirmance by the Appellate Division of the Supreme Court which is sought to be reviewed was made and entered on March 6, 1962.

An extension of time to August 3, 1962, to file this petition was granted by order of Mr. Justice Harlan dated May 17, 1962.

A motion to amend the judgment was made in said court and was granted, and an order to that effect was entered on May 3, 1962. A copy thereof is hereto appended. The order directed that the judgment be amended to read as follows:

> "It is ordered that the said motion to amend the order of this Court, entered on March 6, 1962, is granted so as to include the statement that the court in modifying and affirming the judgment necessarily passed upon questions involving the 1st, 4th and 14th Amendments to the Federal Constitution."

Application was duly made pursuant to Section 520 of the Code of Criminal Procedure of the State of New York to a judge of the Court of Appeals of the State of New York for permission to appeal to the said Court of Appeals. Such permission was denied on March 26, 1962. A copy of the certificate of Judge Stanley H. Fuld denying such leave to appeal is hereto annexed. Under New York practice and procedure, such denial by the first judge to whom such application for leave to appeal is made exhausts all remedies for further appeal in the State. *People* v. *McCarthy*, 250 N. Y. 358. Hence, the Appellate Division of the Supreme Court is the last court of resort in this case, in which a judgment could be had. *Bacon* v. *Texas*, 163 U. S. 207, 215; *Mellon* v. *O'Neill*, 275 U. S. 212, 213; *Sullivan* v. *Texas*, 207 U. S. 416, 422.

The jurisdiction of this court is invoked under 28 U.S.C. §§ 1257 and 2101 on the ground that the Appellate Division decided this case in a way not in accord with the applicable decisions of this court.

Questions Presented for Review

1. Whether or not the doctrine of *Smith* v. *California*, 361 U. S. 147 requires that the prosecution prove knowledge by the accused of the *obscene nature* of the book alleged to be obscene, as distinguished from knowledge of the contents of such publication.

2. Whether or not the failure of the respondent to prove that petitioner knew the contents of the publication to be obscene violated petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether the proof offered by the respondent and reviewed by the trial court was sufficient knowledge of the *contents* of the publication under the doctrine of the *Smith* case and adequately protected petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States.

4. Whether or not Section 1141 Penal Law of New York in so far as it seeks to proscribe publications made up of stories dealing with "sadism" and "masochism" and are "disgusting books" does not offend the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

5. Whether or not the provisions of said Section 1141 with respect to its strictures against stories dealing with sadism and masochism and "disgusting" books are not vague and uncertain, and offend the due process requirements of the Fourteenth Amendment.

6. Whether or not the admission in evidence of the publications, seized without a warrant, was violative of petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

Importance of This Case

This case involves several issues that have not heretofore been passed upon by this court.

In *Smith* v. *California*, 361 U. S. 147 this court made the observation (p. 154): "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."

This petition brings before the court the issues thus left open. It raises two points: 1) what elements in the proof are sufficient to sustain a conclusion of knowledge of the contents; and 2) is proof merely of knowledge of the contents sufficient, or must there be additional proof that the accused knew such contents to be obscene.

Another novel question raised by this petition is whether a state may, without offending the First and Fourteenth Amendments, proscribe publications that deal with sadism and masochism. (cf. *One, Inc.* v. *Oleson*, 355 U. S. 371 and *Manual Enterprises* v. *Day* cert. granted, October Term 1961, No. 123, involving publications on homosexualism). A subsidiary novel question is whether the terms "sadism", "masochism" and "disgusting" are not such vague and indefinite terms as would place them within the ambit of the strictures of *Winters* v. *New York*, 333 U. S. 507.

Provisions of the Constitution of the United States in Point

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State, wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved

Section 1141 Penal Law (pertinent parts):

"Section 1141. Obscene Prints and Articles

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute . . . any obscene, lewed, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story, paper, writing, . . .

2. . . . Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or to be fined not less than one hundred fifty dollars, nor more than two thousand dollars or both fine and imprisonment for the first offense. . .

4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures,

posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

Manner in Which Federal Questions Sought to be Reviewed Were First Raised

The federal questions sought to be reviewed were raised at the trial in the first instance (ff. 94-100, 101-117, 131-135, 144-153). They were rejected by the trial court (ff. 119, 129, 153). They were again raised in the Appellate Division which certified that they were raised there and passed upon by it (*post*, page 20). As to the issue of the illegal search and seizure, the Court of Appeals of New York held in *People* v. *Loria*, 10 N. Y. 2d, 368, that any appeals pending in prosecution prior to *Mapp* v. *Ohio*, 367 U. S. 643, could raise the question of illegal search and seizure even if not raised at the trial. The Court of Appeals has further held, *People* v. *O'Neill*, N.Y. April 6, 1962, New York Law Journal May 7, 1962, page 1, that the right to raise such objection is preserved by a general objection to its admissibility. Such general objection was made at the trial (45, 48, 50, 52, 56).

Statement of Facts

On March 9, 1960, a detective entered a bookstore at 227 West 42nd Street, New York, New York that was owned by Times Square Book Bazaar, Inc. He noticed the petitioner standing near a cash register in the store. The detective went to the rear of the store and examined some books. He then asked the petitioner if he had a book entitled "Pleasure Parade Number 1". The petitioner replied that he did not

carry it, and also insisted that he was familiar with the books in stock (Record 39, 40, 41).

The detective moved again to the rear of the store and continued to examine books there. He selected three titles, "Cult of the Spankers", "Fifi Chastises Her Maid" and "Illustrated Bondage Correspondence" and asked petitioner whether they were for sale. The petitioner, who was a clerk in the store stated they were for sale. Thereupon, the detective placed him under arrest (42, 45).

In an information filed the petitioner was charged in two counts with having violated Section 1141 of the Penal Law of New York. Since the Appellate Division on appeal dismissed the First Count, the text of the Second Count is set forth and reads as follows:

> "And I, The District Attorney Aforesaid, by this information, further accuse the said defendant of the Crime of Obscene Prints and Articles, committed as follows:
>
> The said defendant, on March 9, 1960, in the County of New York, unlawfully did possess with intent to sell, lend, give away, distribute and show, certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting books entitled "Cult of the Spankers", "Bondage Correspondence," and "Fifi Chastises her Maid", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given."

At the trial the aforementioned books were received in evidence over the objection of petitioner (50, 52, 56).

The detective, on cross-examination testified that he had no conversation with petitioner concerning the contents of the books and that he, himself, had not read the books (84, 85, 86). He also testified that the petitioner stated to him that if the books in question had been known to be obscene, they would not have been sold by the store (84, 85).

The defendant was convicted on both counts, but on appeal to the Appellate Division, the First Count was dismissed (see judgment of reversal, post page 18).

Decisions Below

The Court of Special Sessions rendered a judgment convicting the petitioner on both counts. It did not write an opinion (f. 136).

The Appellate Division modified the judgment by dismissing the First Count in that it did not meet state requirements of specificity. But it affirmed the judgment as to the Second Count. In doing so, it passed on the federal constitutional questions raised here (post, p. 20).

The Court of Appeals refused leave to appeal to it (see certificate post, p. 24).

(1)

Arguments relied on for allowance of writ.

Actual knowledge by petitioner must be established.

In *Smith* v. *California*, 361 U. S. 147, this court held that a valid conviction for obscenity must be supported by a statute in which knowledge by the petitioner of the contents of a book is made a necessary element of proof.

There is no proof that the petitioner knew the contents of the books. The prosecution and the court relied solely on the testimony of the arrest officer that the defendant said the books "were not pornographic" and "if it was, he would not carry it" (45, 85, 96).

It is submitted, that this evidence does not satisfy the requirement of the *Smith* case that proof of actual knowledge must be established.

The fact that a defendant upon his arrest made a statement disavowing the guilty character of a publication is no proof that he was familiar with the contents of the book. Disavowals at such times are commonplace and automatic.

Moreover, to accept the bare statement of an officer of such acknowledgment by a storeclerk without proof of actual knowledge would provide a ready tailored technique in the hands of the police for defeating what *Smith* requires.

No other circumstances or proof seems to have been considered by the court and therefore, it is sufficient for the purpose of this petition to rely upon what the court stated.

(2)

There was no proof that petitioner knew the publications to be obscene.

This court in *Smith* held that it is necessary that a *mens rea* in the accused be established. This unescapably means that not only must it be shown that the accused knew the contents, but also knew they were obscene. Lacking such requirement, no evil state of mind can be imputed. This was recognized by this court in *Smith* (p. 152): "by penalizing booksellers even though they had not the slightest

notice of the *character* of the books they sold" and again (p. 154) "falsely deny reason to suspect their *obscenity*".

Justice Black, in concurrence, said (p. 156) "The court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book *even though he is unaware of its obscenity.* And Justice Frankfurter, also concurring, noted (p. 161) "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity.*"

Thus, this court made knowledge of the *character* of a publication a factor in the crime.

There is no proof here that petitioner had such knowledge.

(3)

A State may not proscribe publications that are sadistic, masochistic or disgusting.

The petitioner, in the Second Count (the only one before the court) was charged with a crime in that he "unlawfully did possess with intent to sell, lend, give away, distribute and show, certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting books entitled "Cult of the Spankers," "Bondage Correspondence," and "Fifi Chastises her Maid", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given."

For the purposes of this point it is necessary that particular note be made of the grouping of the characteristics of the books. It is charged that they were obscene etc. and

also that they were "sadistic", "masochistic" and "disgusting" books. Under the rule in *Stromberg* v. *California*, 283 U. S. 359 and *Winters* v. *New York*, 333 U. S. 507, such grouping must lead to a reversal, if it is found that the petitioner could be innocent on any one of the charges, because from the record it cannot be ascertained on which theory he was found guilty. For instance, in *Winters* the defendant was charged with selling a publication made up of stories of crime, bloodshed and lust. It was held by this court that the inability to ascertain which vice was definitely ascribed to the publication even if one charge were good, required a reversal and dismissal of the entire information.

The petitioner urges that if it be shown that he could not be successfully charged with selling "sadistic", "masochistic" or "disgusting" publications, the judgment of his conviction cannot be supported, because the trial court may have weighed the petitioner's guilt on those claimed vices.

In *Roth* v. *United States*, 354 U. S. 476, this court held that the constitutionally permissible scope of "obscenity" was limited to such publications that appealed to prurient interests by the standards of the average person in the community. A book may be "sadistic", "masochistic" and "disgusting". Does that give it qualities that appeal to prurient interests of the average person? It is more likely to have the opposite effect to the average person. Instead of stimulating his prurient interest, it may disgust him, repel him or bore him.

Only those publications that stimulate the average person to lust and pruriency may be proscribed by statute.

Other publications, lacking even social utility, have the protection of the Constitution. *Winters* p. 510. Thus, in *Winters* the publication was made up of stories of lust, bloodshed and crime. Yet this court held them protected, even though their charged vices fitted the language of the statute. It followed that the statute was thus rendered infirm. Likewise, must it follow here, for the group of vices "sadistic", "masochistic" and "disgusting" can be paired with "bloodshed", "crime" and "lust".

See,

One, Inc. v. *Olesen*, 355 U. S. 371;
Mutual Enterprises v. *Day*, No. 123, Oct. Term 1961, cert. granted.

(4)

The words "sadistic", "masochistic" and "disgusting" are vague and indefinite.

Like "bloodshed", "crime" and "lust" in *Winters*, these adjectives suffer from like vagueness. "Sadistic" in its general dictionary sense means pleasure resulting from inflicting harm on others and "masochism" is pleasure derived from receiving abuse. Other, more limited definitions connote the sex pleasures in the conduct described. The statute, however, does not refer to any particular definition.

Even if the definitions are taken in their sex connotations, the infirmity of vagueness appears as it did in *Winters*. Literature of all kinds deals with the pleasures of cruelty, of bloodshed and of crime. Whether the resultant or ultimate pleasure results in sex gratification is not the test, for many characters of classic literature like Hamlet

and Oedipus in recent Freudian interpretations have been subjected to analyses that would have their conduct motivated by a sex urge.

Therefore, the enjoyment of cruelty whether by the dominant or the subject is ever-present in literature as is bloodshed and crime and cruelty. The vagueness found in *Winters* persists here.

(5)

The "pruriency" test should be reexamined by this court.

It is submitted that the test of "obscenity" as stated in *Roth* needs reexamination, since the appeal to "pruriency" is as vague and as indefinite as "obscenity" itself.

(6)

The books were unlawfully seized without a warrant.

The evidence in this case shows that the police officer did not come into the bookstore for the purchase of a book in the normal sense. He came there for the sole purpose of examining the stock of merchandise sold there. The evidence is that he entered the store, went to the rear and examined books. He then asked petitioner for a certain title he was seeking from a list given to him by the police. The petitioner said he did not carry that book (f. 39, 40). He returned to the rear and observed others examining and purchasing books (42). He continued examining other books and when he discovered the three titles mentioned in the Information, inquired their sale and price, and then arrested petitioner (41-45). The officer was in the store

from 11:30 A.M. to 1:30 P.M. before making the arrest (80). This is certainly an abnormal amount of time for an ordinary peruser.

The officer also seized 180 other books, not the subject of the prosecution (57, 67). He also seized 38 photographs, which also are not the subject of the prosecution (70). After the arrest, the officer searched the back of the store, the cellar and the cupboards underneath the counter (84).

But the most significant fact is that the officer had a list of books on which to base an arrest and that he entered the store for the sole purpose of searching for evidence of books on that list:

> "Q. How did you decide to make the arrest? A. I examined the books, I browsed through them, and to my knowledge they came within the provisions of 1141 of the Penal Law.
>
> Q. Were you given the names of these books on a list before you went to that store? A. I had a list, yes, sir.
>
> Q. Did you discuss that list at all with the defendant? A. No, sir.
>
> Q. You didn't buy any of these books, did you? A. No, sir."

Even before *Mapp* v. *Ohio*, 367 U. S. 643, the Constitution proscribed searches without a warrant for the purpose of discovering evidence, *Boyd* v. *United States*, 116 U. S. 616. That this was the officer's purpose is crystal clear and the subsequent arrest, even if lawful, did not validate an unlawful search of the premises (*United States* v. *Di Re*, 332 U. S. 581, 595).

He was not an ordinary peruser or prospective purchaser of books. The inordinate time of two hours that he spent at

the store examining books, would in itself take him out of that class. This is the type of conduct condemned not only in *Mapp* but also in *Marcus* v. *Search Warrants of Property* 6 L. ed. 1127.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 9, 1962.

Respectfully submitted,

EMANUEL REDFIELD,
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New York 5, N. Y.

APPENDIX

Order of Modification of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 6th day of March, 1962.

Present—

Justice Presiding,

Hon. Charles D. Breitel,
" James B. M. McNally,
" Samuel W. Eager,
" Aron Steuer,
" Francis Bergan,

Justices.

4487

The People of the State of New York,

Respondent,

—vs.—

Harold Zucker,

Defendant-Appellant.

Order on Appeal from Judgment

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Court of Special

Order of Modification of Appellate Division, First Department

Sessions of the City of New York, New York County, rendered on the 21st day of March, 1961, convicting defendant of the crime of violating Section 1141 of the Penal Law, and said appeal having been argued by Mr. Ira H. Holley of counsel for the appellant, and by Mr. Joseph A. Phillips of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It hereby is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby modified, on the law and on the facts to the extent of dismissing the first count of the information, and, as so modified, the judgment is affirmed.

ENTER:

VINCENT A. MASSI
Clerk.

Certification

APPELLATE DIVISION OF THE SUPREME COURT

First Judicial Department—State of New York

Clerk's Office

The People of the State of New York

—vs.—

Harold Zucker

I, Vincent A. Massi, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Order has been compared with the original thereof filed in this office on the 6th day of March, 1962, and that the same is a correct transcript thereof, and of the whole of the said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 20th day of April, 1962.

Vincent A. Massi
Clerk

(Seal)

Order of Appellate Division, First Department, Amending Prior Order of Modification

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of May, 1962.

Present—

Hon. Charles D. Breitel,
Justice Presiding,
" James B. M. McNally,
" Samuel W. Eager,
" Aron Steuer,
" Francis Bergan,
Justices.

59

The People of the State of New York,
Respondent,

—vs.—

Harold Zucker,
Defendant-Appellant.

The above-named defendant-appellant having moved this Court for an order amending the order of this Court, entered on March 6, 1962, so that it shall recite the constitutional issues raised by the appellant under the Constitution of the United States and passed upon by the court; and for other relief,

Order of Appellate Division, First Department, Amending Prior Order of Modification

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Emanuel Redfield and Joseph A. Phillips in support of said motion, and after hearing Mr. Emanuel Redfield for the motion, and Mr. Joseph A. Phillips appearing on behalf of respondent, but not opposing,

It is ordered that the said motion to amend the order of this Court, entered on March 6, 1962, is granted so as to include the statement that the court in modifying and affirming the judgment necessarily passed upon questions involving the 1st, 4th and 14th Amendments to the Federal Constitution.

ENTER:

VINCENT A. MASSI
Clerk.

Certification

APPELLATE DIVISION OF THE SUPREME COURT

First Judicial Department—State of New York

Clerk's Office

The People of the State of New York,

—vs—

Harold Zucker

I, Vincent A. Massi, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Order has been compared with the original thereof filed in this office on the 3rd day of May, 1962 and that the same is a correct transcript thereof, and of the whole of the said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York this 4th day of May, 1962.

Vincent A. Massi
Clerk.

(Seal)

Opinion of Appellate Division, First Department

4487. People, &c., res, v. Harold Zucker, def-ap—Judgment of conviction rendered on March 21, 1961, unanimously modified on the law and on the facts, to the extent of dismissing the first count of the information, and, as so modified, affirmed. Defendant was convicted in the Court of Special Sessions, after trial, of the crime of violating section 1141 of the Penal Law (obscene prints and articles) and fined $150 or, in the alternative, ten days in prison; the fine was paid. Defendant's contention, among others, is that he was not adequately informed of the crime charged. The first count of the information charged defendant with unlawfully possessing with intent to sell "a certain obscene, lewd, lascivious, filthy, indecent and disgusting writing, paper, drawing, photograph, figure and image." The subject matter of the charge was not otherwise identified or described. The People offered and there was admitted into evidence thirty-eight photographs and eighteen books. The photographs were selected from approximately 10,000 photographs in the premises where the arrest was made. At no time during the trial did the district attorney point out to the defendants or to the court the particular photograph, photographs or books claimed by him to be the basis of the charge and there is nothing in the record to indicate his position in this connection. The trial court did not as a basis for its finding identify the photograph, photographs or books found by it to be obscene (People v. Grasberg, 13 App. Div. 2d 635). Alleged obscene material must be sufficiently identified (People v. Ambouins, 251 N. Y. 94; People v. Koffroth, 2 N. Y. 2d 807). With reference to the second count of the information, the proof establishes defendant displayed and held out for sale the three specific books mentioned therein, all of which are obscene within the meaning of section 1141 of the Penal Law. We find no necessity for disturbing the sentence. Order filed.

Certificate Denying Leave to Appeal to the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

BEFORE:

HON. STANLEY H. FULD,

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

HAROLD ZUCKER,

Defendant-Appellant.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
March 26, 1962

STANLEY H. FULD
Associate Judge

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IN THE

Supreme Court of the United States

October Term, 1962

No. 175

HAROLD ZUCKER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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H. RICHARD UVILLER
JOSEPH A. PHILLIPS
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IN THE

Supreme Court of the United States

October Term, 1962

No. 175

HAROLD ZUCKER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

Question Presented

Are masochistic and sadistic books and pictures within the preview of obscenity?

Are materials which appeal to the prurient interest of sexual deviates rather than the average person obscene?

What is the nature and degree of proof necessary to establish *scienter* in an obscenity prosecution?

Does browsing in the public portions of a book store constitute a violation of the Fourth Amendment to the United States Constitution?

Statement of the Case.

The record in this appeal of this case is short. It involves the testimony of a single witness and the obscenity exhibits he found on display in the petitioner's book shop. A resume of the testimony and a brief description of the exhibits are necessary to properly evaluate the serious questions posed in the petition.

The Testimony

Detective Edward Flynn testified that on March 9th, 1960 at about 11:30 in the morning he entered a book store called the "Times Square Book Bazaar" which is located at 227 West 42nd Street in New York County (39-40). After going to the rear of the shop and browsing through a number of books which were on display shelves and counters, the officer returned to the front of the shop and questioned the defendant about a particular book (40-7). The defendant, who is the owner and manager of the shop (45), was standing near the cash register (40). He told the police officer that he was familiar with the books in stock and that he did not have the one requested (40-1). After the conversation the detective continued browsing while the defendant made book sales to three customers (41-2). After selecting twenty-one of the articles on display the officer approached the defendant, identified himself and then questioned the defendant about the books (42-3, 46-7, 57). The defendant stated that the books were not pornographic and were for sale at prices ($2 to $5) indicated on the cover (42-5, 55, 85). The police officer then arrested the defendant and seized approximately 1000

sets of photographs which were on display in the store. Thirty-eight of the photos were selected and introduced in evidence on the trial (45, 70-6).

The Exhibits

The exhibits consist of fifteen books, five collections of pages arranged in book form, and thirty-eight photographs. The probative force of the exhibits is two-fold. Any analysis of apparent or visible characteristics of the material is pertinent to a finding of *scienter*. The contents of the exhibits of course are the substance of the crime charged.

The covers

The jackets and backing of most of the material have illustrations which relate to the subject matter of the book. Three of the jackets depict men who are only partially clothed in women's garments (Exhs. 9, 15, 18). The covers on twelve of the exhibits display scenes in which a partially dressed woman is being whipped, beaten, tortured or abused (Exhs. 1, 1A, 2, 3, 5, 6, 8, 12, 14, 16, 17, 19). Also exposed on fourteen of the book jackets are symbols associated with fetishism (Exhs. 1, 1A, 2, 4, 5, 6, 8, 9, 11, 12, 15, 16, 18, 19). In additions to the illustrations, the book jackets also reflect the titles in large print. A few of the more colorful titles are: "Bondage Correspondent" (Exhs. 1 and 1A) "Fifi Chastises Her Maids" (Exh. 2), "The Strange Sisterhood of Mme. Adista" (Exh. 19), "Inquisition at Les Slaves Club" (Exh. 6), "Spanking Fantasies" (Exh. 17), "Cult of Spankers" (Exh. 3), "Males in Bondage" (Exh. 15), and "Boys Will Be Girls" (Exh. 8).

It is further observed that while most of the jackets do not indicate a publisher: a few have been produced in foreign countries (Exhs. 3, 8 and 9) and at least one exhibit (Straps, To Spank or Be Spanked; Exh. 13) is restricted "for subscribers only."

A note on the prices of the material is pertinent. A single exhibit, "Passion Pit," has a price of $3.00 printed on the face. In a majority of the remainder of the exhibits, the prices have been irregularly added to the material, apparently with a rubber stamp. Of interest here is the change of price (from 50¢ to $1.50) of an outdated copy of "Sunshine and Health," the monthly nudist magazine (Exh. 21).

The contents

The contents of this material are not easily categorized. The dominant theme of the matter is obvious. Subordinate themes, however, run across classification lines and indicate that the subject matter has multiple sexual elements interwoven. These elements may roughly be denominated as dealing with transvestism, sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

Although four exhibits, Exhs. 8, 9, 15 and 18) are primarily concerned with transvestism, numerous heterosexual and homosexual seduction scenes are also elaborately described. Considerable emphasis is placed on such sexual fetishes as button boots, leather gloves, six inch high heeled shoes, tight clothing, and leather bras and corsets.

The second group of exhibits (Exhs. 1, 1A, 2, 5, 6, 16 and 19) is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. The sexual fetishism apparent in the first group of exhibits is also prevalent here (spike type heels, leather boots, tight clothing, gloves, whips, ropes and belts). The "spanking" exhibits (Exhs. 3, 8, 13, 14 and 17), involve mistreatment of the victims which is slightly less destructive. However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

Another group of exhibits (Exhs. 10, 12 and 22), while depicting female wrestling matches, display partially dressed women clothed in fetish styled attire.

Of the remaining exhibits (Exhs. 11 and 21), "Passion Pit" (Exh. 11) is a publication similar to a comic-book. It combines sexual seductions, whippings, fetishes and lastly, a suggestion of an incestuous, lesbian relationship. Finally, there is a copy of "Sunshine and Health" (dated June 1959) which is a monthly magazine concerned with nudist activities (Exh. 21).

POINT I

The Court of Appeals' resolution of the petitioner's claims was in conformity with the decisions of this Court.

The petitioner alleges that there are three areas of necessary constitutional litigation presented by the instant case. He further maintains that questions in each of these areas—obscenity, scienter and illegal search—are novel and important (petition p. 4).

As to obscenity

Going much further than the standard of obscenity described by this Court in *Roth* v. *United States* [354 U. S. 476], the New York Court of Appeals has recently interpreted the term "obscene" in the strictest possible manner [*People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)]. In the exceptionally well reasoned *Richmond County News* opinion Judge Fuld notes the following distinction:

> "In the Roth case (354 U. S. 476, supra), the court did say that "Obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487) and that the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (p. 489). These statements, however, can only indicate the broad boundaries of any permissible definition of obscenity under the United States Constitution; they do not pretend to, and cannot, give specific content to the meaning of "obscene" as it appears in our statute."

Utilizing *Roth* as a point of departure, the court proceeded to construe the word "obscene" as it exists in Section 1141 of the Penal Law. The court found that only "hard-core" pornography was included in the term obscene. While the concurring opinion of Chief Judge Desmond suggests that the *Roth* test be utilized to evaluate "hard-core" pornography, the opinion of the court sets forth a new and more rigid criterion which has been followed in a later case [see *People v. Finkelstein*, 11 N. Y. 2d. 300 (1962) cert. pending]. The more rigid standard was described as follows:

> "It (hard-core pornography) focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial, 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity; The Developing Constitutional Standards, 45 Minn. L. Reb. 5, 65)."

The stricter standard was extensively criticized by the desenting opinion:

> "We find nothing in the First Amendment or in the language of the Roth case (supra) which dictates the

strict construction of section 1141 now proposed by Judge Fuld. By limiting the applicability of that section only to what he termed "hard-core pornography", we would be adopting a far more stringent test than is required under present constitutional standards, and in effect be opening the door to obscenity so widely as to be tantamount to a repeal in large measure of section 1141. Since we may constitutionally give vitality to the legislative enactment, why is it necessary for us to strain against the definition laid down by the highest court in the land in order to permit the continued distribution of material which the average person would unhesitatingly condemn as obscene and lewd?"

Recognizing then that the New York standard is more rigorous than that established by this Court, it necessarily follows that what is obscene by the "hard core" test must be obscene by the *Roth* test.

As to scienter

Of less significance is the petitioner's contention that the nature and degree of the People's proof of *scienter* create critical constitutional issues in this case.

Regardless of what mental element is eventually established as a basic minimum of *scienter*, the evidences in the instant case constituted proof beyond a reasonable doubt of a high degree of awareness of the character of the materials.

In the first place the defendant admitted that he was familiar with the books (40-1). He also stated that if they were obscene he would not carry them (42-5), thereby

implicitly acknowledging that he had considered them from this standpoint. Secondly, the book jackets openly proclaim the material contained. Depicting in practically all cases the fantasy symbols of transvestism, fetishism, and sado-masochistic tortures; these jackets go far beyond those covers found on the "slick" magazines. In addition the titles reflected on these jackets in the main effectively inform the casual eye of underlying filth. Other facts which indicate *scienter* are the exorbitant prices assessed for just a few pages of poorly bound material [Exh. 13 (paper covered, staple bound, 20 pages, for $3.00); Exh. 3 (cardboard covered, staple bound, 32 pages for $5.00); Exh. 14 (paper covered, staple-bound, 46 pages for $3.00)]. Also indicating knowledge are notations on the exhibits announcing that the books are "for subscribers only" (Exh. 13), or "for adult collectors of curiosa" (Exh. 11).

Certainly, when all these elements are evaluated the conclusion that *scienter* has been conclusively established is inescapable.

As to the alleged illegal search

The petitioner's final contention is that the People's evidence is the product of an illegal search and seizure.

The record discloses no illegal search and seizure. First, it is clear that the police officer confined himself initially to material displayed for public sale in a book-store. Such perusal of the seller's wares could hardly be deemed a search. Second the materials seized were seized after and pursuant to a lawful arrest. Since the situation described here is analogous to that in *United States* v. *Rabinowitz*

[339 U. S. 56], this State's courts were justified in rejecting the petitioner's Fourth Amendment claim.

From the foregoing the following conclusions are inescapable. First, the exhibits in this case have been found to be "obscene" under a much higher standard than required by *Roth*. Second, upon this record *scienter* has been established beyond a reasonable doubt. Third, browsing in the public parts of a book-store is not an illegal search. And finally that the previous considerations indicate that the petition in the instant case presents no substantial federal constitutional questions.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted.

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